RECORD AND BRIEFS

Nos. 09-958, 09-1158, and 10-283

SEP 1 - 2011

In the
Supreme Court of the United States

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A Nonprofit Corporation, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, et al.,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Respondents offer an unbounded and ahistorical theory of private enforcement of federal statutes. They suggest that Article III standing is all that a private party must establish to judicially enforce a federal law against a state. So long as there is an "injury," there is a lawsuit; congressional intent to permit private enforcement is irrelevant. *Santa Rosa* Resp. Br. 42 ("[T]he scope and purpose of Section 30(A) are irrelevant in assessing the availability of these claims."); *Dominguez* Resp. Br. 29-37 (arguing that Congress's intent not to create any privately enforceable rights is irrelevant). Were Respondents' theory adopted, private litigation over federal statutes would entirely eclipse the administrative enforcement mechanisms created by Congress, as anyone affected by enforcement of a federal statute could sue if they disagreed with how a state was implementing it.

I. This Court's precedents authorize private actions to enforce federal statutes only where Congress intended to permit such private actions – and thereby prevent exactly this sort of wholesale reallocation of legislative and executive branch power and responsibility to the judiciary. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Davis v. Passman*, 442 U.S. 228 (1979). As Respondents have irrevocably conceded, under these precedents, Congress did not confer any privately enforceable rights in enacting 42 U.S.C. § 1396a(a)(30)(A). Respondents suggest that

this Court should create a private remedy anyway, based on a distorted description of the record, the Ninth Circuit's holdings, and the enforcement powers of the United States Department of Health and Human Services (HHS). HHS's enforcement options are more nuanced and flexible than Respondents suggest, and any arguments that they are inadequate should be made to Congress rather than the courts.

II. Neither the Supremacy Clause nor the federal courts' equity jurisdiction supplies the means to circumvent congressional intent.

A. Largely abandoning the Supremacy Clause as the vehicle for their claims, Respondents shift focus to the courts' equity jurisdiction, which they contend supplies a private cause of action to anyone who claims injury based on a "conflict" between federal and state law. However, equity was never as expansive as Respondents suggest, but provided relief through established forms of proceeding. *See Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874); Philip Hamburger, *Law and Judicial Duty* 338-39 (2008). Respondents' claims do not fit within the bill to restrain proceedings at law at issue in *Ex parte Young*, 209 U.S. 123 (1908); the bill to enjoin trespass upon personal property at issue in *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824); or any of the other remedies-based causes of action in the federal equity cases they cite. Moreover, the availability of private equitable relief for purported violations of federal statutes has long been circumscribed by such concerns as separation-of-powers and respect for state

sovereignty. *See, e.g.*, *Sandoval*, 532 U.S. 275; *Blessing v. Freestone*, 520 U.S. 329 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Pennhurst*, 451 U.S. 1.

B. Even if a standalone preemption claim could be asserted in other contexts, Respondents could not use such a vehicle to enforce § 30(A) for two reasons. First, Respondents' cases lack the "repugnancy" element that is so critical to the Supremacy Clause. The allegation that the State has failed to satisfy a statutory funding condition sounds more in contract than it does in the Constitution. Second, Respondents cannot rely on preemption to frustrate congressional intent to vest enforcement of § 30(A) in an administrative agency. Respondents plumb the legislative history of § 30(A) and the Medicaid Act in an attempt to find evidence of contrary intent that does not exist. The legislative history on which Respondents rely invariably concerns *other* provisions of the Medicaid Act that *have* been held to confer privately enforceable rights.

C. Several different strands of prudential standing also bar Respondents' claims. The State has preserved these arguments (although not every strand was preserved in all of the underlying seven appeals). Respondent providers' arguments that they fall within § 30(A)'s zone of interest is premised on the wrong legal standard, and they cannot satisfy the correct one. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987).

ARGUMENT

I. RESPONDENTS CANNOT JUDICIALLY ENFORCE § 30(A) BECAUSE CONGRESS HAS NOT PROVIDED FOR A PRIVATE RIGHT OF ACTION

Respondents lack a private cause of action to enforce § 30(A) because Congress did not create one. Respondents concede that, unlike other provisions of the Medicaid Act, § 30(A) does not create any individualized "rights," whether to a specific level of access, a specific level of provider payments, or anything else. *See Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005). To the contrary, the text and structure of § 30(A), and the relevant legislative history, confirm congressional intent that this federal statute be enforced administratively by HHS rather than through private suits. *Id.* at 1059-62; Pet. Br. 29-33. Because Congress "controls the availability of remedies for violations of statutes," and because Congress has not provided a private remedy here, Respondents lack a cause of action to enforce § 30(A). *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Accordingly, the Ninth Circuit's judgments in the underlying appeals must be reversed.

1. There is nothing "talismanic" (*Cal. Pharm.* Resp. Br. 15) about the application of this Court's precedents here, rooted as they are in separation-of-powers principles. Specifically with respect to funding provisions such as § 30(A), Congress must "'speak[] with a clear voice,' and manifest[] an 'unambiguous'

intent to confer individual rights" for such statutes to be privately enforceable. *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)). Requiring clear and unambiguous evidence of congressional intent to confer individualized rights prevents the exercise by the judiciary of powers belonging to the legislative branch (with which lies the power to enact laws and to provide for their enforcement), and the executive branch (with which falls the duty to "take Care that the Laws be faithfully executed"). *See Sandoval*, 532 U.S. at 286; *Davis v. Passman*, 442 U.S. 228, 241 (1979); U.S. Const., art. II, § 3. That evidence is lacking here, as Respondents concede. *Sanchez*, 416 F.3d at 1059-62. Applying *Gonzaga*, *Pennhurst*, and *Sandoval* will ensure that Congress's intention to provide for centralized administrative enforcement of § 30(A) by HHS is respected rather than undermined.

2. Respondents cannot avoid these precedents by characterizing their claims as "constitutional." It is true this Court has explained that, in contrast to statutory rights, "the judiciary is . . . the primary means through which [constitutional] rights may be enforced." *Davis*, 442 U.S. at 241. There are, however, no constitutional "rights" at issue here. The Supremacy Clause, the only provision of the Constitution upon which Respondents rely, does not confer substantive rights. *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (in contrast to the Commerce Clause, the Supremacy Clause is "'not a source of any federal rights'"); *Chapman v. Houston Welfare Rights Org.*, 441 U.S.

600, 613-15 (1979); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-08 (1989).

The cases upon which Respondents rely confirm only that the Supremacy Clause supplies a rule of decision. *See, e.g., Cal. Pharm.* Resp. Br. 22-23. That the Supremacy Clause supplies a rule of decision in suits asserting conflicts between state and federal law does not render such suits "constitutional." As the Court explained in *Swift & Co. v. Wickham*, "[t]he declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes[,] but *this superiority for present purposes involves merely the construction of an act of Congress*, not the constitutionality of the state enactment." 382 U.S. 111, 121 (1965) (emphasis added, internal quotations omitted). Thus, in *Swift*, this Court held that the claim that a state regulatory statute violated a federal statute was not "upon the ground of the unconstitutionality of such statute," a requirement for a three-judge tribunal under former 28 U.S.C. § 2281. *Id.* at 126-27; *see also Chapman*, 441 U.S. at 612-15 (claim that state regulation is invalid because it conflicts with federal statute was not a civil action seeking redress for the deprivation of "any right, privilege or immunity secured . . . by the Constitution of the United States"); *Golden State*, 493 U.S. at 107-08 (similar).[1]

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[1] *Swift* was not contrary to how the Court had treated Supremacy Clause actions for 50 years, *see Cal. Pharm.* Resp.

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Respondents' contention that they "are seeking to enforce not the Medicaid Act, but the Supremacy Clause," is a fiction that their own briefs cannot sustain. *Compare Santa Rosa* Resp. Br. 49; *Cal. Pharm.* Resp. Br. 41 ("By contrast, the 'essence' of this suit is *not* to enforce Section 30(A), but to enforce the Supremacy Clause.") *with Santa Rosa* Resp. Br. 1 ("claims in this case" seek to enjoin "reductions in Medicaid reimbursement rates that California enacted in violation of Section 30(A) of the Medicaid Act"); *Cal. Pharm.* Resp. Br. 54 (arguing that § 30(A) may be judicially enforced). In Respondents' view, § 30(A) imposes certain requirements to which California failed to adhere when it enacted the statutes challenged in this case. Through their multiple lawsuits, Respondents seek to enforce those requirements against the State – and enjoin state statutes to remedy the State's alleged non-compliance with the federal requirements. Congress, however, intended HHS, not private entities and courts, to be the arbiter of whether the States are complying with § 30(A); Respondents' casting their claims as "constitutional" cannot override that dispositive intent.

3. Respondents contend that administrative enforcement of § 30(A) is inadequate, and that absent injunctions Medicaid recipients would lose access to services. These arguments are neither legally sufficient

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Br. 32-33, but instead relied on a series of older precedents and overruled a more recent decision, *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962). 382 U.S. at 120-27.

nor factually correct. The Ninth Circuit did not hold that the State violated an "access" standard in § 30(A). Instead, the Ninth Circuit premised its findings of § 30(A) violations on the State's failure to comply with "procedural" requirements of the court's own invention. As discussed in the State's petitions for certiorari, the State introduced hundreds of pages of data, analysis, and sworn declarations to demonstrate that the payments, as reduced, would preserve access while incentivizing the use of more efficient services where available. The Ninth Circuit largely disregarded this evidence as untimely and irrelevant.[2]

Respondents characterize HHS's enforcement powers as "impoten[t]," because, they say, its options are limited to withholding all federal funding if a state is out of compliance with its approved State Plan. *Cal. Pharm.* Resp. Br. 49-50. However, federal law permits HHS to limit its withholding (or disallowance) of federal funds to those parts of the State Plan with which a state is out of compliance. 42 U.S.C. § 1396c; 42 C.F.R. § 430.35(d). Thus, if a state

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[2] That this Court declined to review the Ninth Circuit's atextual "procedural" approach does not mean that it was correct; the Court may have concluded that the issue may resolve itself in light of new rulemaking promised by the United States. And the federal government has not "found that [California's statutory] reductions violate the Act." *Santa Rosa* Resp. Br. 2. It denied the SPAs because of the length of time that had passed since they were submitted, a decision the State has appealed. Br. for the U.S. as Amicus Curiae 2a-3a, *Douglas v. Indep. Living Ctr. of S. Cal.*, No. 09-958 (Dec. 3, 2010).

chooses to implement a rate reduction that is not approved, the state bears the risk that HHS will withhold federal funds related to the noncompliant rate at issue: a "severe" penalty to be sure, but not the total loss of funding that Respondents describe. *See Cal. Pharm.* Resp. Br. 49; *Santa Rosa* Resp. Br. 40 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704-06 (1979)). Moreover, most disputes between states and HHS over compliance with funding conditions are resolved through negotiations and settlements that take into account all relevant interests, federal, state, and private – an essential aspect of administrative enforcement that is lost under Respondents' all-or-nothing injunction approach. *See Cal. Pharm. Ass'n v. Dep't of Health & Human Servs.*, No. C-91-0846-DLJ, 1991 U.S. Dist. LEXIS 13891, at *19-20 (Sept. 13, 1991) ("negotiation" is a part of the "enforcement process in use by [HHS] . . . which [is] used to bring states into compliance without a termination of funds"). Contrary to the impotence label that Respondents attempt to attach to HHS's enforcement powers, the administrative process brings to bear "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking." *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring). In any event, any concerns over the adequacy of remedies for federal statutes is a policy determination for Congress to address. *United States v. Locke*, 529 U.S. 89, 117 (2000) ("The issue is not adequate regulation but political responsibility.").

II. PRIVATE PARTIES MAY NOT USE A PREEMPTION THEORY TO ENFORCE § 30(A)

The State's opening brief demonstrated that the Supremacy Clause may supply a rule of decision (i.e., that federal law "trumps" state law when they conflict), but not a cause of action. Pet. Br. 36-40. This Court's preemption cases confirm at most that a federal cause of action may exist where (1) Congress has conferred a federal right; and (2) a party-to-be-regulated seeks to assert federal preemption of state law as a defense to actual or threatened enforcement proceedings (in which case equity may supply the cause of action). Pet. Br. 42-44 & n.14. Even if the Supremacy Clause *could* supply a cause of action where a conflict between federal and state law is alleged, it cannot do so where the only allegation is that a state has failed to satisfy a funding condition, and where such an action would contravene congressional intent. Pet. Br. 46-49.

A. Neither the Supremacy Clause, Nor Equity, Supplies Private Parties with a Cause of Action to Enforce § 30(A)

Respondents now appear to concede that the Supremacy Clause does not create any causes of action, and therefore seek to premise their lawsuits on the federal courts' equity jurisdiction instead.[3] To that

[3] The parties' descriptions of the adoption and operation of the Supremacy Clause are remarkably consistent. *Compare Santa*

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end, they assert that equity vindicates the Supremacy Clause by providing a cause of action for injunctive relief when a party has been injured based on a purported conflict between state and federal law.[4] Under their theory, all that a party needs to demonstrate is Article III standing, and congressional intent is irrelevant. Respondents' arguments fail for several reasons.

1. Respondents do not satisfy the criteria for federal equity jurisdiction applied in this Court's preemption cases: existence of a federally conferred *right*, or assertion of federal preemption as a *defense* to purportedly invalid regulation. Respondents contend that the latter "limitation on the authority of the federal courts is not supported by history or precedent." *Dominguez* Resp. Br. 5. However, *both* these criteria were satisfied in *Ex parte Young*, 209 U.S. 123 (1908), and one or both of these criteria were satisfied in virtually all of the sixty-one preemption cases set forth in Respondents' appendix. *See Dominguez* Resp. Br. App.

a. Respondents repeatedly invoke *Young* to support the proposition that a standalone equity cause of

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Rosa Resp. Br. 13-18 *with* Pet. Br. 36-41. Respondents then argue that "[a] private right of action . . . is necessary to satisfy this constitutional purpose," i.e., that the judiciary rule conflicting state laws "void" (*Santa Rosa* Resp. Br. 14), but this leap in logic is not supported by history or this Court's precedents.

[4] The Ninth Circuit did not limit itself to equitable remedies, however, but awarded retroactive damages when requested to do so. *Indep. Living* Pet. App. 29-37, 46-47.

action exists to vindicate the supremacy of federal law. In *Young*, however, plaintiffs sued to protect infringement of their constitutional "rights," a circumstance not present here. Moreover, *Young* does not represent an unbounded federal equitable power to enjoin state officials, but rather a well-established bill in equity to restrain proceedings at law. *See Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642-44 (2011) (Kennedy, J., concurring); John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989 (2008).

A party could obtain an injunction of actual or imminent enforcement proceedings where, *inter alia*, the party had a defense to those proceedings but a legal judgment in defendant's favor would not provide an adequate remedy. 2 John Norton Pomeroy, *A Treatise on Equitable Remedies* § 646 (1905) (*Equitable Remedies*). When the defense was based on the invalidity of state law, a party could demonstrate lack of an adequate legal remedy if it faced a Hobson's choice: either comply with the purportedly invalid law, or else violate that law and be exposed to fines, penalties, or other liability. *Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992); *see also Pub. Utils. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 469 (1943); *Terrace v. Thompson*, 263 U.S. 197, 215-16 (1923); *Young*, 209 U.S. at 163-64. In addition, equitable relief was available in such cases only "to protect *property rights and the rights of persons* against injuries otherwise irremediable." *Terrace*, 263 U.S. at 214 (emphasis added).

Plaintiffs in *Young* satisfied all of these requirements, and their use of the anti-suit injunction is confirmed by Justice Peckham's framing of the issue: whether a party could "obtain freedom from suits, civil or criminal," when faced with impending enforcement of an unconstitutional state law. 209 U.S. at 149. Additionally, the Court found that plaintiffs had no adequate remedy at law, emphasizing the difficulty of finding a railroad employee willing to defy the law as well as the fines the railroad company would incur for violating the act. *Id.* at 163-64. Immediately after *Young* was decided, the case was cited consistently for the limited proposition that "'individuals, who, as officers of the state . . . *threaten and are about to commence proceedings, either of a civil or criminal nature*, to enforce against parties affected [by] an unconstitutional act, . . . may be enjoined by a federal court of equity from such action.'" *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919) (emphasis added); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 293 (1913); *W. Union Tel. Co. v. Andrews*, 216 U.S. 165, 166 (1910). The present cases, by contrast, do not involve the impairment of personal or property rights, a defense to state regulation, or any "Hobson's choice," and Respondents do not contend otherwise.[5]

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[5] The well-pleaded complaint rule does not support Respondents' claim that *Young* recognized a "federal cause of action to enjoin state officials who come into conflict with the Constitution or federal laws." *Cal. Pharm.* Resp. Br. 21. Rather, the equity plaintiff's preemptive federal defense satisfied the well-pleaded complaint rule because a bill in equity had to "tell the entire

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Respondents' reliance on *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824), which they characterize as a precursor to *Young*, is similarly misplaced. *See Cal. Pharm.* Resp. Br. 20-21. *Osborn* and *Young* did not represent the same cause of action. Instead, as the Court explained in *Young*, *Osborn* was a suit to enjoin "trespass upon . . . tangible property," whereas *Young* was "a bill filed to prevent the commencement of suits." 209 U.S. at 167. Moreover, plaintiffs in *Osborn* asserted infringement of federally protected "rights and privileges," and Congress had expressly authorized suit in federal court. 22 U.S. at 825, 839. Far from supporting Respondents' position, *Osborn* demonstrates no more than that federal equity jurisdiction may be available when a party's claims fit within a pre-existing cause of action, involve infringement of federal rights, and do not conflict with congressional intent – none of which can be said about the present actions.

b. The sixty-one preemption cases cited by Respondents confirm, rather than undercut, the limitations on federal equity jurisdiction. *See Dominguez* Resp. Br. App. In forty-seven of the sixty-one cases, plaintiffs asserted federal preemption as an anticipatory *defense* to state enforcement of purportedly invalid state regulation of their conduct. *See Dominguez*

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story" of why the defendant's action was unlawful. Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1129 (1969); *see also* 1 Roger Foster, *A Treatise on Federal Practice in Civil Cases* § 67 (1892).

Resp. Br. App. (Nos. 1-4, 6, 8-11, 13, 15-16, 18, 20-34, 35-43, 46-54, 57).[6] In addition, federal "rights" may have been lurking in a number of these cases.[7] And sixteen of these forty-seven cases involved express pre-emption clauses, a type of federal statute from which

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[6] *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), is included because preemption was raised defensively by a county in a state court lawsuit brought by a school district to enforce a state statute.

[7] *See, e.g.*, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007) ("We have 'interpret[ed] grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.' "); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 584 (1987) (" 'rights granted by the Mining Law of 1872' "); *Lawrence*, 469 U.S. at 258 (federal statute authorized a local unit to "use the payment for any governmental purpose"); *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984) ("[S]tate law which interferes with the exercise of these federally protected rights . . . is pre-empted."); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights."); *Malone v. White Motor Corp.*, 435 U.S. 497, 502 (1978) (claim that state law " 'interferes with the right of Plaintiffs to free collective bargaining under federal law' "); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 281 (1977) (federal license "transfer[s] to the licensee 'all the right' which Congress has the power to convey"); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) ("[T]his legislation deals with the rights, liberties, and personal freedoms of human beings. . . ."); *Cummings v. City of Chicago*, 188 U.S. 410, 411-12 (1903) ("The controlling question . . . is whether the plaintiffs have the right, in virtue of certain legislation of Congress and of certain action of the Secretary of War . . . to proceed with the proposed work. . . ."); *see also N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519 (1979) (asserting *Machinists*-type preemption claim); *Golden State*, 493 U.S. 103.

it may be possible to infer congressional intent to permit a private right of action. *Dominguez* Resp. Br. App. (Nos. 1, 3, 4, 6, 8, 9, 11, 15, 16, 18, 20, 22, 23, 26, 32, 40).

Of the cases that remain, five involved challenges to state or local taxation of a federal instrumentality, or of land that retained a federal interest or character. *Dominguez* Resp. Br. App. (Nos. 55, 56, 58, 59, 61). These cases, too, do not support Respondents. At the time these cases were filed, this Court had recognized, though carefully circumscribed, the circumstances in which a bill in equity could be brought to enjoin illegal state tax collection. *See Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282-83, 285 (1909). Based on this well-established authority, state officials did not dispute federal equity jurisdiction in such cases. *See Choctaw, Okla., & Gulf R.R. Co. v. Harrison*, 235 U.S. 292, 296 (1914). Respondents, by contrast, are not seeking to enjoin collection of an illegal tax.[8]

That this Court assumed the existence of a cause of action in the few remaining cases does not mean that there was one. *See Sandoval*, 532 U.S. at 287 (describing "*ancien régime*," in which "rights" were not

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[8] In addition, the parties in such suits appear to have been asserting federally protected rights not to be subject to state taxation. *Osborn*, 22 U.S. at 838; *see also Boise*, 213 U.S. at 282 (an equity court will not interfere with state taxing efforts "in . . . cases where the Federal rights of the persons could otherwise be preserved unimpaired" through, *inter alia*, remedies at law).

analyzed with the same rigor). That said, a number of the remaining cases appear to have involved individualized, if unexamined, federal rights upon which the state purportedly was infringing.[9] *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), on which Respondents heavily rely, arose in the highly specialized context of foreign relations. *See Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985). Had the issue been raised, the Court might have inferred the requisite intent to permit private enforcement based on this unique context, or held that no private action existed. Preemption in *Foster v. Love*, 522 U.S. 67 (1997), upon which Respondents also heavily rely, was premised on congressional action pursuant to the Elections Clause; again,

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[9] *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), was expressly brought under § 1983, and 42 U.S.C. § 503(a)(1) has been held to be privately enforceable. *See* Br. of the Appellants, S. Ct. No. 70-507, 1970 WL 136861, at *1-2 (Dec. 2, 1970); *Zambrano v. Reinert*, 291 F.3d 964 (7th Cir. 2002). Plaintiffs in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), sought to enforce 42 U.S.C. § 1396p, which prohibits states from imposing a lien "against the property of any individual prior to his death." While *Rosado v. Wyman*, 397 U.S. 397 (1970), did not address plaintiffs' cause of action, the Court clearly assumed plaintiffs had a right to enforce the federal statutory provisions at issue. *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *id.* at 30 (Powell, J., dissenting); *Edelman v. Jordan*, 415 U.S. 651, 676 (1974); *id.* at 690 (Marshall, J., dissenting). One additional case involves the NLRA, a federal statute conferring rights enforceable under 42 U.S.C. § 1983. *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218 (1993); *Golden State*, 493 U.S. 103.

had the issue been raised, the Court might have inferred the requisite intent from this specialized context, *see Gonzalez v. Arizona*, 624 F.3d 1162, 1174 (9th Cir. 2010), or simply held that plaintiff voters lacked a private cause of action. *Cf. Lance v. Coffman*, 549 U.S. 437 (2007) (Colorado voters lacked standing to challenge provision of Colorado Constitution as violating the Elections Clause).[10]

Finally, in the sixty-one cases, preemption actions were brought in service of congressional intent, most frequently to prevent state regulatory action from undermining the uniformity of a federal regulatory scheme. *See, e.g., Ray v. Atl. Richfield Co.*, 435 U.S. 151, 165 (1978) ("Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers."); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 625 (1973); *Campbell v. Hussey*, 368 U.S. 297, 300-01 (1961). By contrast, Respondents' effort to maintain a private cause of action is *contrary* to congressional intent, and would lead to *disunity* rather than uniformity in the interpretation of

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[10] *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 719-21 (1865), cited by Respondents, did not involve a federal claim per se, as federal jurisdiction was based on diversity of citizenship, and plaintiff was asserting, *inter alia*, a nuisance claim, in addition to infringement of unspecified "rights." In *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996) (per curiam), the Court only granted certiorari on the scope of the injunctions; it did not address the underlying claim of preemption.

federal law. Perhaps more striking is that, in some of these cases, state efforts to supplement remedies provided by Congress were held preempted because Congress intended for centralized administrative enforcement. *See, e.g., Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289-90 (1986) ("The NLRA, in contrast, was designed in large part to 'entrus[t] administration of the labor policy for the Nation to a centralized administrative agency.'"); *see also N.Y. Tel. Co.*, 440 U.S. at 528. Respondents invoke preemption here to achieve *exactly the opposite* result – to *compel* a supplemental remedy *in contravention* of congressional intent for centralized administrative enforcement.

c. Respondents resort, finally, to general equitable principles in an effort to find a vehicle for their lawsuits, claiming that equity courts would grant relief to "anyone harmed" so long as the case "otherwise fell within the federal courts' jurisdiction." *Cal. Pharm.* Resp. Br. 27; *Dominguez* Resp. Br. 11. Their theory, thus, contains no limiting principles whatsoever, beyond Article III standing. Even were Respondents correct as a historical matter, the availability of equitable relief to enforce federal statutes has long been circumscribed by such concerns as separation-of-powers, respect for state sovereignty, and fidelity to congressional intent. *See, e.g., Sandoval*, 532 U.S. 275; *Blessing v. Freestone*, 520 U.S. 329 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Pennhurst*, 451 U.S. 1; *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (the "contractual

nature" of Spending Clause laws "has implications for our construction of the scope of available remedies"). Private parties in *Sandoval*, *Blessing*, *Seminole*, and *Pennhurst* all claimed injury and sought equitable relief, and in all these cases that relief was denied.[11]

Respondents' conception of equity jurisdiction is, in any event, ahistorical. Equity courts were not "roving commission[s] to do justice beyond the law," but provided relief through established forms of proceeding. Philip Hamburger, *Law and Judicial Duty* 338-39 (2008); *see also Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873); Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 784-92 (2004). A claim had to fit with certain remedies-based causes of action, such as a bill to restrain proceedings at law or a bill to restrain the assessment of taxes. *Bellia*, *supra*, at 784-86; *see also* 1 Foster, *supra*, § 210 (describing circumstances in which an injunction may issue). Respondents' claims fit into neither the bill to restrain proceedings at law nor any of the remedies-based causes of action in the federal equity cases they cite. *See Dominguez* Resp. Br. 7-10, 17, 39-40 (citing, among others, cases filed

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[11] If it was true that the only requirement for a federal action "to bring a government official into compliance with federal law" was standing, *see Cal. Pharm.* Resp. Br. 20, many of the Court's decisions on whether a federal statute could be privately enforced under § 1983 were mere sport. In many of these cases, private parties sought injunctive relief, and it could have been ordered under Respondents' theory without resort to § 1983. *See* Amicus Br. of the U.S. 26-27.

under bills to restrain nuisance, to enjoin the collection of taxes, to enjoin trespass, and to restrain proceedings at law).

Respondents thus urge precisely the vision of equity practice that early commentators and this Court have warned against. *See* 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 19 (14th ed. 1918) ("If indeed a Court of Equity in England did possess the unbounded jurisdiction which has been thus generally ascribed to it . . . it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 658 (1873) (court of equity may not "depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles"). It was a maxim of equity that "[e]quity follows the law." 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 425 (3d ed. 1905) (*Equity Jurisprudence*). A court of equity could not "create a remedy in violation of law, or even without the authority of law." *Rees*, 86 U.S. at 122. Thus, "where a particular remedy is given by the law, and that remedy bounded and circumscribed by particular rules, it would be very improper" for a court of equity to "take it up where the law leaves it, and to extend it further than the law allows." 1 Pomeroy, *Equity Jurisprudence*, *supra*, § 425; *see also I.N.S. v. Pangilinan*, 486 U.S. 875, 883 (1988) ("'[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'"); *Rees*, 86 U.S. at 122.

Here, the administrative remedy provided by Congress, "bounded and circumscribed by particular rules," may not be extended in the absence of congressional intent.

Finally, Respondents cannot allege the impairment of right or title that is required for equitable relief against a state actor, such as a right to real and personal property, rights in person, and statutory rights. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939); *Terrace*, 263 U.S. at 214; 1 Pomeroy, *Equitable Remedies*, *supra*, § 323. Plaintiffs in the cases cited by Respondents satisfied this requirement.[12] Respondents do not – indeed, the very premise of these cases is that they lack any rights under the Spending Clause provision at issue.

d. In light of these precedents, Respondents now claim that the present cases involve a defense to state regulation of their primary conduct. *Santa Rosa* Resp. Br. 34-35; *Cal. Pharm.* Resp. Br. 27. They cite California Welfare and Institutions Code § 14019.4, a state law that prohibits them from seeking reimbursement directly from Medicaid beneficiaries. However, the present lawsuits challenge the State's rate reductions,

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[12] *See, e.g., Scott v. Donald*, 165 U.S. 107 (1897) (bill to enjoin state confiscation of plaintiff's liquor); *Pennoyer v. McConnaughy*, 140 U.S. 1, 25 (1891) (bill to enjoin defendants from selling and conveying land to which plaintiff asserted title); *Poindexter v. Greenhow*, 114 U.S. 270, 283 (1885) (action of detinue against a tax collector for return of personal property); *Hughes v. Trustees of Morden Coll.*, 27 Eng. Rep. 973 (Ch. 1748) (bill to enjoin trespass on land in plaintiff's possession).

not the State's enforcement of § 14019.4. Further, Respondents have never claimed, and have therefore waived any argument, that § 14019.4 conflicts with federal law.

2. Respondents contend that they may assert a standalone cause of action to vindicate the proper "structural" relationship between the federal and state governments, but the cases upon which they rely do not support their theory. In *Bond v. United States*, 131 S. Ct. 2355 (2011), and related cases, private parties raised federal constitutional provisions as a *defense* to actual or anticipated enforcement of a state or federal statute that otherwise would have regulated plaintiff's conduct and subjected plaintiff to penalties. Thus, while this Court permitted a criminal defendant in *Bond* to raise the Tenth Amendment as a defense to enforcement of a federal criminal statute against her, this Court has refused to allow private parties to sue under the Tenth Amendment where the defensive component was lacking. *Tenn. Elec.*, 306 U.S. at 144. Indeed, in *Bond*, this Court explained that the power companies in *Tennessee Electric* lacked a cause of action to challenge the competitive operations of the TVA precisely because the state had not sought to *regulate* plaintiffs (and penalize any noncompliance), but merely to *compete* with them. 131 S. Ct. at 2362. Similarly, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), in which an investigated entity sought to challenge the creation of a federal oversight board on separation-of-powers grounds, the Court expressly acknowledged

the defensive posture of the case, explaining that "[w]e normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law.'" 130 S. Ct. at 3151.[13]

Respondents also cite, in support of their "structural" cause-of-action theory, dissenting opinions in *Dennis v. Higgins* and *Golden State*. Again, however, these dissents discussed the *defensive* use of Constitution-derived "structural" immunities to invalid state regulation. *See, e.g.*, *Dennis*, 498 U.S. at 451-65 (Kennedy, J., dissenting); *Golden State*, 493 U.S. at 113-19 (Kennedy, J., dissenting). While the *Golden State* dissent discussed the existence of this type of immunity, it did not address the circumstances under which it could be asserted. In *Dennis*, however, Justice Kennedy clarified that he had a defensive suit in mind when he wrote the *Golden State* dissent. 498 U.S. at 462-63 (Kennedy, J., dissenting) (under the reasoning of the *Golden State* dissent, the party in *Higgins* could have "rel[ied] on the unconstitutionality [under the Commerce Clause] of the tax in defending a collection action brought by the State"). More recent opinions have further emphasized the defensive nature of such suits against the States.

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[13] *Free Enterprise Fund* did not "expressly uph[o]ld 'an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles.'" *Santa Rosa* Resp. Br. at 25 (quoting 130 S. Ct. at 3151 n.2 (quoting Brief for the United States 22)). The quote-within-a-quote was a party's characterization of the issues, not the Court's holding.

Va. Office for Prot. & Advocacy, 131 S. Ct. at 1642 (Kennedy, J., concurring) ("That negative injunction [in *Ex parte Young*] was nothing more than the preemptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law."); *see also id.* at 1643 ("*Verizon Md.* itself was an easy case, for it involved the same kind of preenforcement assertion of a defense that was at issue in *Young*.").

In any event, the present cases do not involve purported "structural" violations. By their nature, "structural" violations involve state "encroachment on Federal powers," and the remedy when such encroachment occurs is to declare such state action "void." *See Higgins*, 498 U.S. at 443 n.4 (quoting Rep. Shellabarger, Cong. Globe, 42nd Cong., 1st Sess., App. 69-70 (1871)). Here, the challenged state reductions do not "encroach" on any federal power, but at most amount to a purported failure to satisfy a federal funding condition. *See* Part II.B, *infra*.

3. Respondents also cite, as authority to enjoin state officials who are purportedly acting in excess of their authority, cases challenging *federal* government action under the "non-statutory review" doctrine. *Cal. Pharm.* Resp. Br. 23-25. Cases against federal officials, however, do not implicate the same federalism concerns that govern lawsuits against a *state* in a *Spending Clause* context – concerns that lie at the heart of the limitations on such suits recognized in *Gonzaga* and *Pennhurst*. Moreover, these claims, too, are subject to the requirements that apply to other

equitable causes of action, including, *inter alia*, irreparable injury to personal property, rights to real and personal property, rights in person, and statutory rights. *See, e.g., Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (Postmaster General's withholding of mail "violate[d] the property rights of the person whose letters are withheld"); *Harmon v. Brucker*, 355 U.S. 579, 582 (1958) (per curiam) ("[T]he claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries.").[14] Respondents have asserted no such legally cognizable right or interest. Part II.A.1.c, *supra*. And, in both *McAnnulty* and *Harmon*, the administrative review process had been completed, which enabled the Court to conclude there were no other means to redress plaintiffs' injuries. *Harmon*, 355 U.S. at 580; *McAnnulty*, 187 U.S. at 122. Here, by contrast, the administrative review process remains pending and, were HHS to rule against the State, it could order the State to provide additional retroactive funding to avoid forfeiting federal funds.[15]

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[14] *Dalton v. Specter*, 511 U.S. 462, 474 (1994), also cited by Respondents, did not hold that plaintiffs had a cause of action, but merely "assume[d so] for the sake for argument," a point that Respondents' truncated quotation obscures. *Compare Cal. Pharm.* Resp. Br. 24 *with* 511 U.S. at 474.

[15] That the State, in such a circumstance, would have the *option* of choosing *not* to make additional payments, and thereby forfeit federal funds, is an essential feature of Spending Clause legislation. Thus, the State's possible selection of that option

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4. Respondents suggest that their inability to satisfy the criteria guiding when federal equity courts would hear preemption claims goes to the merits of a cause of action rather than its existence. *Santa Rosa* Resp. Br. 35; *Dominguez* Resp. Br. 48 n.24. However, the "concept of a 'cause of action' is employed specifically to determine who may judicially enforce . . . statutory rights or obligations." *Davis*, 442 U.S. at 239; *see also id.* ("If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a 'cause of action.'"). Because Congress has not included Respondents among those who may enforce obligations owed by the State to the federal government under § 30(A), they lack a cause of action.

B. Preemption Is Not Available to Enforce § 30(A), a Funding Condition, in Contravention of Congressional Intent

Even if private parties could bring standalone preemption claims to enforce federal statutes in appropriate cases, private preemption claims would not be available to Respondents to enforce § 30(A). This is because (1) Respondents' cases lack the "repugnancy" element so critical to the Supremacy Clause; and (2) preemption claims may not be recognized in contravention of congressional intent regarding how federal statutes are to be enforced.

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would not render an administrative remedy "inadequate" to justify the exercise of equity jurisdiction.

1. Respondents cannot satisfy the predicate for the type of suit they claim exists: a conflict between state and federal law. A state may fail to satisfy a Medicaid funding requirement, *but still be in compliance with federal law*. Section 30(A) imposes a condition for receipt of federal funds, while *other* federal laws direct what happens when a state fails to satisfy a funding condition. *See, e.g.*, 42 U.S.C. § 1396c; 42 C.F.R. §§ 430.33, 430.35, 430.38, 430.42, 430.48. Although it is alleged that California has breached a funding condition, it is not alleged that California has violated any law governing the consequences for that breach, nor could Respondents assert such a claim; such a claim would be unripe (even assuming Respondents had standing to assert it), as the administrative process is still pending with respect to the reductions at issue. In short, an alleged breach of a funding condition, by itself, does not supply the type of conflict between federal and state laws that implicates the Supremacy Clause. Rather, as demonstrated in Petitioners' opening brief, the remedies for any breach are governed by the contractual relationship between the State and Federal governments, as set forth in statutes, regulations, and state plans. Pet. Br. 46-49.

And while Respondents are no doubt correct that it is wrong "to imply that *all* contract-law rules apply to Spending Clause legislation," *Barnes v. Gorman*, 536 U.S. 181, 186 (2002), this Court in *Barnes* also noted that it has "repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a

contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.'" *Id.* Among those conditions are the sanctions for noncompliance. Respondents' insistence that "the Supremacy Clause applies to *all* 'Laws of the United States,'" including Spending Clause enactments, is a non sequitur. *Dominguez* Rep. Br. 22. Here, that law provides that "State plans that do not meet [§ 30(A)'s] requirements are to be defunded by the Secretary – they are not void under the Supremacy Clause." *PhRMA v. Walsh*, 538 U.S. 644, 680 n.3 (2003) (Thomas, J., concurring in judgment). To be sure, as Respondents observe, this Court has sometimes described state laws that breached Spending Clause conditions as being "pre-empted." That may have served as a convenient, albeit inaccurate, shorthand. Chief Justice Burger was correct when he stated that "adherence to the provisions of [a Spending Clause provision] is in no way mandatory upon the States under the Supremacy Clause. The appropriate inquiry . . . should be simply whether the State has indeed adhered to the provisions and is accordingly entitled to utilize federal funds in support of its program." *Townsend v. Swank*, 404 U.S. 282, 292 (1971) (Burger, C.J., concurring in the result).

This does not mean that *all* provisions of the Medicaid Act (or other Spending Clause statutes) are unenforceable by private parties. Numerous provisions of the Medicaid Act have been held to "clearly" and "unambiguously" confer "rights" on private parties that are judicially enforceable. Pet. Br. 46 n.17. Such

lawsuits are not premised on abstract concerns about federal-state conflicts or federal-state structural relationships, but rather on the actual deprivation of concrete federal "rights." When created by Congress, such rights become a part of a state's quasicontractual relationship with the federal government. While private parties may sue to protect such "rights," that is not the type of lawsuit at issue here.

2. Further, private preemption claims are not available *in spite* of Congress's intent regarding how federal statutes are to be enforced, but only *in service* of that intent. *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (plurality opinion) ("[I]t is Congress rather than the courts that preempts state law."); *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) ("'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'"); *see, e.g.*, *Gould*, 475 U.S. at 289-90 (preempting supplemental state law remedy as inconsistent with administrative enforcement of federal statute). As the United States explains, Amicus Br. of the U.S. 31-32, Congress has put HHS, not private parties, in charge of holding states to their obligations to balance the policy objectives in § 30(A) when setting rates, a legislative delegation that the courts must respect.

Respondents mine the legislative history of § 30(A) and other provisions of the Medicaid Act for expressions of congressional intent to provide for private enforcement. Their effort fails on multiple levels. First, it cannot be reconciled with their longstanding concession that, as the Ninth Circuit held in *Sanchez*

v. Johnson, § 30(A) does not create any privately enforceable rights. It is far too late in the day for Respondents to call into question the very predicate of the issue now before this Court. Second, even if they existed, expressions of intent buried deep in the legislative history could not supply the "clear" and "unambiguous" intent to confer a privately enforceable "right" required for private enforcement of federal funding conditions. *See Gonzaga*, 536 U.S. at 280; *supra*, Part I.

Third, and in any event, no such evidence of intent resides in the legislative history of § 30(A). Respondents and their amici quote extensively from a committee report prepared in connection with the Omnibus Reconciliation Act of 1981, but the language on which they rely appears in a section of the report describing amendments to Medicaid's "freedom-of-choice" provision, 42 U.S.C. § 1396a(a)(23), *not § 30(A)*, and specifically refers to the "rights of Medicaid beneficiaries or participating providers." *Cal. Pharm.* Resp. Br. 54-55 (citing H.R. Rep. No. 97-158, Vol. II, at 301 (1981)); *Indep. Living* Resp. Br. 20-21, 54-55; Amicus Br. of Former HHS Officials 15; Amicus Br. of AMA 13. Unlike § 30(A), the freedom-of-choice requirement (giving Medicaid recipients the power to choose their doctors) has been held to confer private, judicially enforceable, rights on beneficiaries. *See, e.g., Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006).

Respondents also note that Congress amended § 30(A) in 1989 to supplement the factors that states must balance as part of their ratemaking. *Cal. Pharm.*

Resp. Br. 55. However, they did not contend below, and do not now contend, that the 1989 amendment conferred any "rights" or otherwise evinced congressional intent that it be judicially enforced by private parties.[16] Seven members of Congress urge that "Congress has expressly chosen to maintain § 30A knowing full well that it provides enforceable rights." Amicus Br. of Members of Congress 5. However, Congress's failure to enact a legislative "fix" to the host of circuit decisions holding that § 30A does *not* confer rights suggests otherwise.

Respondents also cite a committee report demonstrating Congress's intention to preserve providers' right to sue for injunctive relief under the Boren Amendment following repeal of that statute's Eleventh Amendment waiver requirement. *Cal. Pharm.* Resp. Br. 51-52; *see* S. Rep. 94-1240, at 4 (1976). Preservation of some form of private enforcement of Boren following the waiver repeal made sense, given that, unlike § 30(A), Congress *"designed [Boren] to afford providers access to a judicial remedy for purposes of enforcing their legal rights."* S. Rep. No. 94-1240, *supra*, at 3 (emphasis added). Significantly, no such similar expressions of legislative intent exist with respect to § 30(A) regarding either "legal rights" or their enforcement. To the contrary, substantial differences

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[16] Contrary to Respondents' assertions, the State does not concede that this language did more than add a new objective to those that States must balance in establishing rates. *See Cal. Pharm.* Resp. Br. 56.

in the text and structure of Boren and § 30(A) suggest that Congress had entirely different intentions with respect to how the two provisions would be enforced, and by whom. Boren required states to set payments at a level that was "reasonable and adequate" to "meet the costs" of efficiently and economically operated providers, and to "find[ ] and make[ ] assurances satisfactory to the Secretary" that the standard was satisfied. *Wilder*, 496 U.S. at 503. By contrast, § 30(A) does not set an objective, judicially enforceable standard for the States' Medicaid ratemaking, nor does it make state findings – and HHS approval of those findings – a precondition to valid rates.[17] Finally, that Congress did not require the States to waive their Eleventh Amendment immunity to claims under § 30(A), as it previously did for Boren, and has done in connection with other federal statutes, *see, e.g.*, 20 U.S.C. § 1403(a)-(b), is consistent with the absence of any privately enforceable rights, and therefore supports Petitioners, not Respondents.

Congressional enactments in the wake of *Suter v. Artist M.*, 503 U.S. 347 (1992), to confirm the private

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[17] Boren's express requirement of HHS approval of a state's findings may explain why some courts interpreted Boren as requiring states to obtain SPA approval prior to changing their rates. *See, e.g., Exeter Mem. Hosp. Ass'n v. Belshe*, 145 F.3d 1106 (9th Cir. 1998). No statute or regulation currently in effect imposes such a requirement on the States, let alone confers on providers or beneficiaries a right to judicially enforce it. *See* Supplemental Brief of Petitioners, *Douglas v. Cal. Pharm. Ass'n*, S. Ct. No. 09-1158 (Dec. 20, 2010).

enforceability of *some* state plan components, do not reflect congressional intent that *all* provisions of such plans, or of the Social Security Act generally, be privately enforceable. *See Cal. Pharm.* Resp. Br. 53; *Dominguez* Resp. Br. 25-26. Even as Congress enacted the *Suter* fix, it directed that this legislation not be otherwise construed "to limit *or expand* the grounds for determining the availability of private actions," and confirmed that the statute at issue in *Suter* was not privately enforceable. 42 U.S.C. §§ 1320a-2, 1320a-10 (emphasis added); *see also* Amicus Br. for the U.S. 30-31.

Respondents' remaining arguments regarding congressional intent take aim at straw men. Petitioners do not contend that *all* funding conditions in Spending Clause statutes are off-limits to private enforcement, *Santa Rosa* Resp. Br. 36, nor do they contend that Congress has entirely displaced private enforcement of the Medicaid Act. *See Cal. Pharm.* Resp. Br. 46. Rather, Petitioners argue only that private enforcement is limited to those provisions of the Medicaid Act that reflect congressional intent to confer a "right" and a remedy (which § 1983 may supply). That Congress once considered but failed to enact legislation that would have eliminated *all* private Medicaid suits, *Cal. Pharm.* Resp. Br. 58-59, is thus of no moment.

C. Prudential Standing Principles Bar Respondents' Claims

Three different strands of prudential-standing analysis also bar Respondents' claims. Pet. Br. 49-52.

These arguments have been properly preserved for review by this Court.

While it is true that every strand of prudential-standing analysis was not preserved in *every* one of the underlying seven appeals, it is also true that two of the strands (no-third-party-assertion-of-rights and zone-of-interest) were preserved in *at least one or more* of the underlying appeals. *See* Pet. Br. 50 n.19. The third strand, barring "generalized" grievances, was suggested by the Ninth Circuit's analysis rather than by Respondents' pleadings. These prudential standing arguments are "fairly included" in the question presented: "Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 30(A)." S. Ct. Rule 14.1(a).

Turning to the merits: In arguing that Medicaid providers are within the "zone of interest" protected by § 30(A), Respondents conflate the zone-of-interest test that applies under the "generous review provisions" of the Administrative Procedure Act ("APA") with the more rigorous zone-of-interest test that applies outside of that context. *Bennett v. Spear*, 520 U.S. 154, 163 (1997); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987). Because this is not an APA case, providers must demonstrate that Congress enacted § 30(A) for their "*especial* benefit." *Clarke*, 479 U.S. at 399-400 n.16. This they cannot do.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

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Respectfully submitted,

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